U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: March 13, 1992
CASE NO. 82-CTA-334

IN THE MATTER OF

U.S. DEPARTMENT OF LABOR,

v.

BERGEN COUNTY, NEW JERSEY, CETA.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA or the Act), 29 U.S.C. §§ 801-999 (Supp. V 1981), [1/] and its regulations, 20 C.F.R. Parts 675-680 (1990). The Grant Officer (G.O.) filed exceptions to the Decision and Order (D. and 0.) of the Administrative Law Judge (ALJ) insofar as it held that certain CETA funds which the G.O. concluded had been misspent need not be repaid. The case was accepted for review in accordance with the applicable procedure.

BACKGROUND

In his final determination, dated August 19, 1982, the G.O. disallowed a total of $265,485.00 for two contracts awarded by the Bergen County Community Action Program (BCCAP) to the

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1/ CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

National Training Systems Corporation (NTSC) because the contracts were awarded without competition. See Department of Labor Exhibits (DX) 3, Tab 8; 2 at 29. In the Request for Proposals (RFP), BCCAP sought proposals for vocational training in several specified occupational fields. The RFP also stated that @@proposals will be considered for other occupational fields, whether traditional or newly demanded, if adequate documentation of need is presented." Respondent% Exhibit (RX) 1 at 3.

BCCAP received seventeen proposals, Transcript (T.) 69, ten of which were offered into evidence. RX 3 and 4. NTSC was the only offeror to submit a "supported work" [2/] program proposal. Under Title I of CETA BCCAP entered into two contracts with NTSC: (1) a contract for $16,320.00 to conduct a feasibility study to plan a supported work program and (2) a contract for $249,165.00 to implement a supported work program. See DX 2 at 29: D. and 0. at 2. In neither case does the record show that BCCAP sought competition for providing these services from any other vendor.

The ALJ agreed that the NTSC contracts were improperly awarded, D. and 0. at 7, but found that repayment would constitute an unduly onerous burden and, under circumstances such as this case, in which full or substantial performance has been completed, any remedial steps should be prospective in

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[2/] NTSC described supported work as follows: "Supported work is a vocational skills training program, but it is also much more in structuring its entire training design on the provision of highly individualized services to ex-offenders, ex-addicts, and other target populations to bring them to the point of job-readiness and place them in meaningful employment." RX 3.

nature. Id. at 9-10. He therefore allowed these expenditures. Id. at 10.

DISCUSSION

A. Competition in Awarding Contracts

The G.O. argues that Bergen County, the grantee, has waived its right to review of whether it violated federal procurement standards in the award of the NTSC contracts because it raised no exceptions to the ALJ's decision. G.O. Reply Brief (Rep. Br.) at 2-3. While 20 C.F.R. § 676.91(f) requires that all exceptions be raised or waived, this requirement has been construed as imposing obligations only on the losing party or a prevailing party which seeks to alter the judgment. In the Matter of U.S. Department of Labor v. City of Tacoma, Washington, Case No. 83-CTA-288, Sec. Ord. Oct. 24, 1990, slip op. at 3-4. Moreover, this regulatory provision was promulgated after the period for filing exceptions in this case had expired. See 20 C.F.R. 676.91(f) (1982); amended by 49 Fed. Reg. 19,640, May 9, 1984.

In the instant case, the grantee received a favorable judgment in that the expenditures for the NTSC contracts were allowed. I therefore conclude that the grantee need not have filed exceptions to contest the absence of competition findings because it would be seeking to support rather than alter the judgment. See City of Tacoma, slip op. at 3-4.

The grantee argues that the ALJ erred in finding that it did not comply with applicable CETA regulations by promoting free and open competition. Grantee's Brief (Gr. Br.) at 2. By drafting

the RFP as it did, BCCAP, the grantee argues, met the requirements of Federal Management Circular (FMC) 74-7 and promoted maximum competition by attracting a wide range of proposals. Gr. Br. at 6. The CETA regulation applicable to these contracts, 29 C.F.R. § 98.20 (1983), adopts FMC 74-7 as the standard for reviewing procurement of services. It provides that "all procurement transactions ... shall be conducted in a manner that provides maximum open and free competition." DX 1.

The ALJ observed that the request for "innovative" programs was entirely open ended. While it may have stimulated competition in the development of ideas for new programs, the ALJ concluded that it fostered no competition for expenditures on plans to study or implement them. D. and 0. at 6. Both the contract for the feasibility study and the contract to implement the supported work program were awarded to NTSC without competition. The ALJ, while noting that the supported work concept was new, concluded that there was no justification for failing to explore competitive supply options. Id. at 7. He agreed with the G.O. that the NTSC contracts were, in effect, sole source procurements awarded in violation of FMC 74-7 and 29 C.F.R. § 98.20. Id.

Under federal procurement law, there is a presumption in favor of all feasible competition. Unless an offeror is the only known source with the capability to satisfy the procuring activity% requirements, a sole source decision will be held to

have no rational basis. Aero Corporation v. Department of the Naw, 540 F. Supp. 180, 208-09 (D.D.C. 1982). See Burroughs Corp. v. United States, 617 F.2d 590, 599 (Ct. Cl. 1980) (sole source procurements strongly discouraged by procurement regulations which state that all purchases to be made on competitive basis to maximum practicable extent.)

Once the grantee decided it wanted a supported work program, the awards were made to NTSC without competition notwithstanding that the grantee conceded, as the ALJ noted, D. and 0. at 7, that there was another possible source. Moreover, an RFP for a supported work program may have generated even more proposals. Because the awards were made without establishing that NTSC was the only known source which could satisfy the grantee's requirements, the decision to award the contracts to NTSC is without rational basis. Aero Corporation, 540 F. Supp. at 208. These contracts are therefore improper expenditures under CETA as the services were not procured in a manner that provides maximum open and free competition. 29 C.F.R. § 98.20: FMC 74-7.

B. Repayment of Misspent Funds

Although the ALJ found that the NTSC contracts were not competitively procured, he declined to order repayment because in his view it would constitute an unduly onerous burden on the grantee. D. and 0. at 9. The ALJ reasoned that unlike some other CETA audit cases, the government has been the recipient of valuable services under these contracts. Following the policy of the Comptroller General in noncompetitive procurement cases, the

ALJ concluded that any remedial steps should be prospective in nature and, therefore, ordered that the expenditures on the NTSC contracts be allowed. Id. at 9-10.

In addressing the repayment issue, the first step is to determine the amount of funds misspent. Where there has been a noncompetitive procurement, the misspent amount is considered to be the full amount of the award. 3/ City of St. Louis v. U.S. Department of Labor, 787 F.2d 342, 344, 347 (8th Cir. 1986). See Onslow County, North Carolina v. U.S. Department of Labor, 774 F.2d 607, 613 & n.7 (4th Cir. 1985).

The next step is to consider if repayment of any of the misspent funds should be waived. CETA Section 106(d), 29 U.S.C. § 816(d), allows for waiver of repayment for misspent CETA funds in certain instances. CETA, however, creates a presumption in favor of repayment and the exception to this rule is narrow. Chicano Education and Manpower Services v. United States Department of Labor, 909 F.2d 1320, 1327 (9th Cir. 1990).

To implement Section 106(d), the Department of Labor promulgated 20 C.F.R. § 676.88(c). See In the Matter of

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3/ The grantee, citing City of Oakland v. Donovan, 703 F.2d 1104, 1107 (9th Cir. 1983), contends that courts require that the relief sought for CETA violations have some rational relationship to the violation, suggesting that full recovery of the amounts awarded to NTSC would be inappropriate. Gr. Br. at 22. In City of Oakland, the remedy sought was termination of an $11.7 million grant because of the grantee's failure to repay a disallowed $61,000.00 subgrant. While the court disapproved of that remedy, the grantee later agreed to repay the full amount of the subgrant. See City of Oakland v. Donovan, 707 F.2d 1013 (9th Cir. 1983). Seeking full repayment of the NTSC contracts is consistent with the result in that case.

Blackfeet Tribe v. United States Department of Labor, Case No. 85-CPA-45, Sec. Dec. Dec. 2, 1991, slip op. at 4 & n.3. In considering the waiver of repayment issue, the Department, [4] as the G.O. argues, G.O. Br. at 16, is only required to take into account those specific equitable factors listed in Section 676.88(c), but may also consider "factors not covered by the regulation/ [5] Chicano, 909 F.2d at 1327. In this instance, there is no discretion to waive repayment of the amounts awarded to NTSC through noncompetitive procurements because the waiver provision of Section 676.88(c) applies only to misspent funds associated with public service employment programs (Title VI of CETA) and ineligible participants. In the Matter of United States Department of Labor v. Rockinsham/Strafford Employment and Training Consortium, Case No. 81-CTA-363, Sec. Dec. Mar. 11, 1991, slip op. at 4; In the Matter of Central Tribes of the Shawnee Area, Inc. v. U.S. Department of Labor, Case No. 85-CPA-17, Sec. Dec. Dec. 14, 1989, slip op. at 3-5.

CONCLUSION AND ORDER

For the foregoing reasons, I affirm the ALJ's finding that the $265,485.00 spent on the NTSC contracts was misspent since the procurements were noncompetitive. I reverse the ALJ's

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[4] The grantee contends that 29 C.F.R. § 676.88(c) does not bind the ALJ or the Secretary concerning the waiver issue. Gr. Br. at 18. I disagree. Section 676.88(c) applies at ail stages of the administrative process. See In the Matter of City of Torrance, Case No. 79-CETA-254, Sec. Dec. Mar. 22, 1988, slip op. at 3-5.

[5] The ALJ's consideration of Comptroller General policy in procurement cases without first considering if Section 676.88(c) provided discretion to waive repayment was therefore error.

conclusion that these expenditures should be allowed because they are not "costs associated with ineligible participants and public service employment programs" repayment of which "may" be waived if the criteria of 20 C.F.R. § 676.88(c) are met. The grantee, Bergen County, New Jersey, CETA, is therefore ordered to pay $265,485.00 to the Department of Labor. This payment shall be from non-Federal funds. Milwaukee County, Wisconsin v. Donovan, 771 F.2d 983, 993 (7th Cir. 1985).

SO ORDERED.

Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of U.S. Department of Labor v. Bergen County, New Jersey, CETA

Case No. : 82-CTA-334

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on MAR 13 1992.

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